

No. 43368-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

K. M.,

Appellant.

Mason County Superior Court Cause No. 12-8-00016-1

The Honorable Judge Amber Finlay

Appellant's Reply Brief

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ARGUMENT

I. K.M. WAS CONVICTED IN PART BASED ON IMPROPER OPINION EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

It is improper for a witness to opine on an accused person's guilt. State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987). An opinion is inadmissible if it is a "nearly-explicit" statement that the witness believes the accused is guilty. State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009).

In this case, K.M. presented testimony suggesting that he was in actual danger of serious injury (i.e. that Kilmer hit his broken nose and attempted to choke him), and that his own actions were performed in self-defense (in an attempt to get away and prevent further injury to himself). RP 82-85. Respondent's contrary assertion is without merit. See Brief of Respondent, p. 7 ("[I]t is not clear that K.M. ever presented sufficient evidence that he assaulted Kilmer in self-defense...")

Two officers opined that K.M. was not at imminent risk of serious injury. RP 10, 56. The clear implication is that K.M. was not entitled to use self-defense, and thus was guilty of assault. This invaded the province of the fact-finder, in violation of due process. State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). The officers should have testified to

their observations—i.e. who did what—and left the legal conclusions to the court.

By testifying that K.M. was not in “imminent danger of serious injury,”¹ each officer provided an inadmissible opinion on an essential element of the offense. Johnson, at 934; see State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). K.M.’s conviction must be reversed and the case remanded with instructions to exclude such testimony on retrial. Id.

II. K.M. WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

K.M. rests on the argument set forth in Appellant’s Opening Brief.

III. THE JUDICIARY MAY NOT ELIMINATE OR IMPAIR A DEFENSE CREATED BY THE LEGISLATURE.

Washington’s constitution separates the legislative and judicial powers. State v. Rice, 174 Wn.2d 884, 900, 279 P.3d 849 (2012). This division is especially important in the criminal arena. Id, at 900-901. The legislature has the exclusive authority to define crimes. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d

¹ RP 10, 56.

80 (2000); see also *State v. Clark*, 170 Wn. App. 166, 283 P.3d 1116 (2012).

The judiciary may not attempt to improve upon legislative schemes. *State v. Delgado*, 148 Wn.2d 723, 730, 63 P.3d 792 (2003). Instead, courts may only apply the law to the facts of a particular case. *W. v. Thurston County*, 168 Wn. App. 162, 184 n. 25, 275 P.3d 1200 (2012).

The legislature has declared that the use of force against another person is justified “[w]henever used by a party about to be injured... in case the force is not more than is necessary.” RCW 9A.16.020(3). The judiciary has ignored this clear language, and applied a different standard—requiring actual danger of serious injury—in self-defense cases involving unlawful arrest or detention. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000); *State v. Garcia*, 107 Wn. App. 545, 27 P.3d 1225 (2001).

The “serious injury” standard adopted in these cases violates the constitutional separation of powers.² *Wadsworth*, at 734. The judiciary has trespassed on the legislature’s exclusive authority to define the scope of criminal liability in assault cases. *Id.*

² No court has been asked to uphold the standard in the face of a separation of powers challenge.

The infringement comes not from the requirement of actual (as opposed to apparent) danger. Respondent correctly points out that the statute does not specify whether actual or apparent danger is sufficient to justify self-defense. Brief of Respondent, pp. 13-14. Accordingly, the judiciary is free to interpret the defense to allow for self defense in cases of apparent danger. See RCW 9A.040.060 (allowing the judiciary to supplement penal statutes with the common law “insofar as not inconsistent with the Constitution and statutes.”)

It is another matter, however, to restrict the availability of the defense in a manner that conflicts with the statute. The infringement here results from the judicially-imposed requirement of “serious” injury, when the legislature has authorized the use of force for anyone “about to be injured” (regardless of the severity of the injury.) Compare Bradley, at 733 with RCW 9A.16.020(3). Respondent’s silence on this point may be treated as a concession. See *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

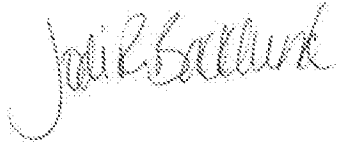
The “serious injury” standard is unconstitutional, and K.M.’s conviction cannot stand. RCW 9A.16.020(3); Wadsworth, at 734. The case must be remanded for a new trial, with instructions to evaluate K.M.’s self-defense claim under the standard set forth in RCW 9A.16.020(3).

CONCLUSION

K.M.'s conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on February 14, 2013

BACKLUND AND MISTRY

A handwritten signature in cursive script, reading "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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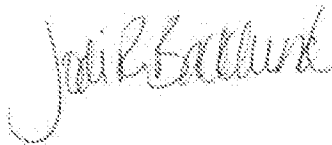
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 14, 2013.

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BACKLUND & MISTRY

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